SUPREME COURT, U.S.
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No. 02-102

In The

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas Fourteenth District

BRIEF *AMICUS CURIAE* OF UNITED FAMILIES INTERNATIONAL IN SUPPORT OF RESPONDENT

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Interest of *Amicus Curiae*[*]

United Families International (UFI) is a non-sectarian 501(c)(3) public charity based in Gilbert, Arizona. UFI, which was founded in 1978, seeks to maintain and strengthen the family unit in the United States and other countries by promoting traditional marriage, parental rights, cultural values, the rights of unborn children and national sovereignty. UFI has been granted official consultative status at the United Nations as a non-governmental organization, and has participated in numerous population conferences worldwide.

Recognizing that the family is the natural and fundamental group unit of society and should be accorded the widest possible protection and assistance, and that families worldwide include both nuclear and single-parent families, UFI is committed to supporting those measures designed to maintain and strengthen the family by promoting respect for marriage between man and woman, founded on chastity before marriage and fidelity in marriage; the sanctity of human life, including the unborn; the right and obligation of parents to love, protect, provide for, and teach their children; existing laws, political structures and cultural norms that preserve and promote the family; and compassion for the disadvantaged and distressed, including orphans and street children.

UFI believes that a ruling by this Court extending protection to homosexual acts of sodomy would ultimately lead to judicially-mandated recognition of same-sex "marriage," which would irretrievably undermine the institution of marriage in this country. To assist the Court in addressing the issues presented by this case, *amicus* submits this brief.

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[*] Letters of consent have been filed with the Clerk. None of the counsel for the parties authored this brief in whole or in part, and no one other than *amicus* or its counsel has contributed money or services to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

During the oral argument in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), Justice Souter asked the Solicitor General whether the Court's adoption of the rational-basis standard of review for abortion regulation would allow the States to prohibit all abortions (except to save the mother's life). When the Solicitor General replied that it was best not to answer such a question in the abstract, Justice Souter pressed him on the matter stating, "[y]ou're asking the Court to adopt a standard, and I think we ought to know where the standard would take us."[1] So, too, in this case, the Court needs to know where adoption of petitioners' proposed standards for reviewing the Texas sodomy statute, TEXAS PENAL CODE § 21.06 (West 1994), would take the Court and the Nation.

Affirming the Texas Court of Appeals would leave in place a small misdemeanor fine ($200.00) for engaging in conduct that the State of Texas almost never prosecutes and which few other States criminalize, much less prosecute, as petitioners and their *amici* readily acknowledge. Reversing the lower court, however, will inevitably lead to a demand that the States recognize same-sex marriage, a demand which, given the logic of petitioners' arguments in this case, would be difficult to deny should they prevail here. In their petition for writ of *certiorari*, petitioners claimed that "this case does not present questions concerning formal recognition or affirmative support of gay and lesbian couples and their children." Pet. at 30. Having obtained review, that disclaimer has vanished from their brief on the merits.

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[1] 216 Kurland & Casper, LANDMARK BRIEFS & ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, 1991 Term Supplement at 1218.

On the surface, this case may appear to concern only the authority of the State to define as criminal sexual acts between members of the same sex. But that appearance is deceptive. At a deeper level, it is about the law's ability to draw *any* distinctions between heterosexual and homosexual relationships and to recognize the former, but not the latter, in the institution of marriage The public policy choice of Texas and every other State that restricts marriage to a relationship between one man and one woman would not long survive a decision by this Court holding that there is a due process liberty interest in engaging in homosexual acts of sodomy, or a holding that equal protection principles blind the States from seeing any differences between heterosexual and homosexual behavior. For its own sake and for the sake of the American People from whom it ultimately derives its authority, the Court should not start down that road.

1. This is not an appropriate case in which to decide the questions presented. Petitioners ask this Court to recognize a fundamental liberty interest of adults to engage in consensual same-sex acts of sodomy in private, and to hold that a law that distinguishes between same-sex and opposite-sex acts of sodomy violates equal protection principles. Yet, the record of petitioners' pleas of *nolo contendere* to the charges of committing deviate sexual conduct (anal intercourse) does not exclude the possibility that their conduct was nonconsensual, commercial or even public, all of which petitioners concede the State may prohibit, as it does with opposite-sex conduct. Because the conduct of which petitioners were convicted may not have been entitled to constitutional protection, even on their theory of liberty and privacy, and, therefore, would have been subject to prosecution regardless of the sex of the participants, the writ of *certiorari* should be dismissed as having been improvidently granted.

Assuming that the writ is not dismissed, *amicus* submits that petitioners have provided this Court with no principled basis on which it could accept either their due process or their equal protection arguments.

2. Petitioners' attempt to discover a fundamental liberty interest (or right) of adults to engage in sexual conduct outside of marriage is unavailing. None of the three "aspects of personal liberty" on which they rely supports recognition of such an interest. Petitioners' extraction of an abstract right to "intimate relationships" from the Court's contraception cases ignores unambiguous statements in those (and other) cases either rejecting a right to engage in sexual conduct outside of marriage or declining to announce such a holding. The individual's interest in "bodily integrity" is similarly inapplicable. That interest is primarily concerned with "limits on governmental power to mandate medical treatment or to bar its rejection." *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992). But that interest does not confer upon a person a right to do whatever he wants to do with his body, a "right" that was rejected by the Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997). Finally, the undisputed interest persons have in "the privacy of the home" does not place whatever they do in the home beyond the reach of the criminal law. *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986); *Stanley v. Georgia*, 394 U.S. 557, 568 n.11 (1969).

3. Petitioners' equal protection argument claim rests on a number of erroneous assumptions, the principal one of which is that § 21.06 classifies persons on the basis of their sexual orientation. Upon examination, § 21.06 clearly classifies conduct, thus rendering moot petitioners' equal protection argument. Even assuming that the statute may be said to discriminate against homosexual, as opposed to heterosexual, conduct, that discrimination is not unconstitutional.

Neither this Court nor any court of appeals has held that classifications based on one's sexual orientation are subject to heightened scrutiny under the Equal Protection Clause. And ten of the thirteen courts of appeals have held (or strongly implied) otherwise. Moreover, whether sexual *orientation* (as opposed to conduct) is a legitimate basis for classification is a question not fairly raised in this case because § 21.06 does not purport to define as criminal the *status* of one's sexual orientation. The prohibition of same-sex, but not opposite sex, acts of sodomy is rationally related to one or more legitimate state interests, including the State's belief that sexual conduct between members of the same sex is immoral and should be discouraged. Nothing in this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), properly understood, forbids the State from making that choice.

ARGUMENT

I. THE COURT SHOULD DISMISS THE WRIT OF *CERTIORARI* AS HAVING BEEN IMPROVIDENTLY GRANTED.

As a threshold matter, *amicus curiae* submits that, on the basis of the record presented, this case does not present a suitable opportunity for reaching the constitutional claims petitioners have raised. Accordingly, the writ of *certiorari* should be dismissed as having been improvidently granted.

Petitioners challenged § 21.06 both on its face and as applied to "consensual, adult, private sexual relations with another person of the same sex." Pet. App. at 117a-118a, 121a-122a, 130a-131a, 134a-135a. Petitioners do not dispute that, consistent with the Constitution, the State of Texas may prosecute same-sex acts of sodomy committed in public, for compensation, without consent or with minors. Pet. Br. at 3,

22 n.16. Although other provisions of the Texas Penal Code might better describe some or all of these offenses, they also fall within the scope of § 21.06. *See Torme v. State*, 525 S.W.2d 9 (Tex. Crim. App. 1975). The statute, therefore, cannot be said to be unconstitutional on its face, *i.e.*, in all of its possible applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Because petitioners do not claim that all conceivable applications of § 21.06.would be unconstitutional, this case does not present a valid facial challenge. Nor does it present an appropriate as-applied challenge.

Petitioners entered pleas of *nolo contendere* to the charges once their motions to quash the complaints were denied. Although the sketchy record does confirm that petitioners are adults, it provides no basis for determining whether either petitioner was compensated for engaging in an act of sodomy, whether the act was consensual or even whether the police were allowed (or expected) to observe the act following their entry into petitioner Lawrence's home (an apartment), thereby destroying its private nature. Because the record does not exclude the possibility that the act was compensated, nonconsensual or, in some constitutionally relevant sense, public, this is not an appropriate case to reach the constitutional claims raised by petitioners. For that reason, the writ of *certiorari* should be dismissed as having been improvidently granted. *See International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers Union v. Denver Milk Producers, Inc.*, 334 U.S. 809 (1948) (*per curiam*) (dismissing appeal without prejudice and declining "to decide the Constitutional issues" raised "[b]ecause of the inadequacy of the record").

II. NOTHING IN THE LIBERTY LANGUAGE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PREVENTS THE STATE OF TEXAS FROM PROHIBITING SAME-SEX ACTS OF SODOMY.

In their argument based upon the Due Process Clause, petitioners assert that "adults have fundamental liberty and privacy interests in making their own choices about private, consensual sexual practices." Pet. Br. at 11. They purport to derive such interests from the "convergence" of "well-established protections for intimate relationships, bodily integrity, and the privacy of the home." *Id.* And they insist that it is only this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that stands between them and recognition of those interests. Pet. Br. at 29 ("[v]indication of Petitioners' constitutionally protected liberty interests should not be blocked by continued adherence to *Bowers*").

Petitioners' claims do not withstand scrutiny. Upon careful examination of the Court's precedents, it becomes evident that none of the "three . . . aspects of personal liberty" on which petitioners rely (*i.e.*, "intimate relationships," "bodily integrity" and "the privacy of the home"), Pet. Br. at 11, supports their thesis that "adults have a fundamental interest in consensual sexual intimacy," *id.* at 19, regardless of the nature of the sexual acts involved or the marital status of the parties. Thus, even if *Bowers* had not decided the precise due process issue raised here, petitioners' argument that there is a fundamental liberty (or privacy) interest in engaging in same-sex acts of sodomy would find no home in the Court's prior decisions. Moreover, *Bowers* should not be overruled because it is fully consistent with this Court's jurisprudence in evaluating asserted liberty interests under the Due Process Clause. Petitioners' due process argument should be rejected.

A. There Is No Fundamental Liberty Interest In Engaging In Sexual Acts Outside Of Marriage.

Intimate Relationships

Petitioners initially claim that the prohibition of same-sex acts of sodomy unconstitutionally interferes with their "intimate relationships." Pet. Br. at 11-13. Contrary to the implications in their brief, however, this Court has never held that there is a constitutional right of adults to engage in sexual relations outside of marriage, *see Carey v. Population Services International*, 431 U.S. 678, 694 n.17 (1977) (the Court "has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual behavior] among adults"), or that prohibitions of such conduct must satisfy the strict scrutiny standard of review, *id.* at 688 n. 5 (declining to hold that state regulation must meet this standard whenever it implicates "sexual freedom" or affects "adult sexual relations"); *id.* at 705 (Powell, J., concurring in part and concurring in the judgment) ("[n]either our precedents nor sound principles of constitutional analysis require state legislation to meet the exacting 'compelling state interest' standard whenever it implicates sexual freedom").[2] Indeed, the Court has strongly intimated that such conduct is *not* entitled to constitutional protection.

Thus, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court characterized as "unsupportable" the claim that its prior cases concerning childrearing and education, family relationships, procreation, marriage, contraception and abor-

[2] *See also Carey*, 431 U.S. at 702 (White, J., concurring in part and concurring in the judgment) (opinion does not affect the power of States to forbid premarital or extramarital sexual relations).

tion "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription." *Id.* at 191.[3] And in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court rejected petitioners' argument that "conduct which directly involves 'consenting adults' only has, for that sole reason, a special claim to constitutional protection." *Id.* at 68. While acknowledging that the Constitution "establishes a broad range of conditions on the exercise of power by the States," the Court refused to hold that "conduct involving consenting adults only is always beyond state recognition," citing, *inter alia*, laws against adultery and fornication. *Id.* at 68 & n. 15.[4] Nor do the Court's contraception cases lend any support to petitioners' assertion of an untrammeled liberty interest in engaging in sexual relations outside of marriage.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, observed that "[t]he State of Connecticut does have statutes, *the constitutionality of which is beyond doubt*, which prohibit adultery and fornication." *Griswold*, 381 U.S. at 498 (Goldberg, J., concurring) (emphasis supplied). Justice

[3] The dissenters in *Bowers* recognized the authority of the State to proscribe adultery and incest. *See Bowers*, 478 U.S. at 209 n.4 (Blackmun, J., dissenting), 217 (Stevens, J., dissenting).

[4] Among the cases cited in *Slaton* were *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (fornication and adultery statutes "express a general and strong state policy against promiscuous conduct, whether engaged in by those who are married, those who may marry or those who may not" and, if enforced, "would reach illicit relations of any kind and in this way protect the integrity of the marriage laws of the State"), and *Southern Surety Co. v. Oklahoma*, 241 U.S. 582, 586 (1916) ("[a]dultery is an offense against the marriage relation, and belongs to the class of subjects which each State controls in its own way").

Goldberg stressed that "the Court's holding today . . . in no way interferes with a State's proper regulation of sexual promiscuity or misconduct." *Id.* at 498-99. Justice White expressed the view that "the State's policy against all forms of promiscuous or illicit sexual relations, be they premarital or extramarital," was "a permissible and legitimate interest." *Id.* at 505 (White, J., concurring in the judgment). Justice Stewart, joined by Justice Black, noted in dissent that "even after today a State can constitutionally still punish at least some offenses which are not committed in public." *Id.* at 530 n.7 (Stewart, J., dissenting). Thus, in *Griswold*, *six* Justices *confirmed* the authority of the State to prohibit sexual relations outside of marriage, and *no* Justice *disputed* that authority.

In *Griswold*, Justice Goldberg relied upon Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 522-55 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds). *See Griswold*, 381 U.S. at 499, quoting *Poe*, 367 U.S. at 553. In *Poe*, Justice Harlan expressly acknowledged the State's authority to prohibit fornication, adultery, homosexuality and incest. 367 U.S. at 545-48, 552-56. *Apropos* of petitioners' claims here, Justice Harlan stated:

> The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, *confining sexuality to lawful marriage*, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

Id. at 546 (citation omitted) (emphasis supplied).

Petitioners would not "build upon that basis," but seek to undermine it. That effort should be resisted. "The right of privacy," Justice Harlan emphasized, "most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, *however privately practiced*." *Id.* at 552 (emphasis supplied). Justice Harlan's dissent in *Poe* was clearly concerned with the *means* of regulating the details of intimacy in a relationship (*i.e.*, marriage) that the State itself sanctions and protects, as opposed to those "sexual intimacies" which the State forbids altogether," such as "[a]dultery, homosexuality and the like." *Id.* at 553.

> It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Id.

No decision of this Court recognizes a right of adults to engage in "intimate relationships" outside of marriage.[5] Petitioners' alternative grounds for recognizing a "fundamental interest in consensual sexual intimacy" fare no better.

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[5] As the Court's opinion in *Carey v. Population Services, International* makes clear, 431 U.S. at 685, its earlier opinion in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), was concerned with "[t]he decision whether or not bear or beget a child," a concern not implicated by § 21.06, and not whether there is an independent right to engage in sexual relations outside of marriage. Nowhere in *Eisenstadt* did the Court question the State's authority to proscribe fornication or adultery. Indeed, the State's authority to do so was conceded. 405 U.S. at 447-50.

Bodily Integrity

Petitioners claim that the prohibition of same-sex acts of sodomy impermissibly interferes with their "bodily integrity." Pet. Br. at 13-14. The Court has decided a series of cases that, taken together, fairly could be said to recognize a liberty interest in "bodily integrity," particularly as it relates to unwanted medical treatment or commitment.[6] Nevertheless, it is not at all clear how a law *forbidding* (as opposed to one

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[6] *See Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) ("[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions," citing, *inter alia*, *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905) (upholding compulsory vaccination statute)). *See also Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (forcing antipsychotic medication upon a pre-trial detainee requires an "overriding justification and a determination of medical appropriateness"); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (person "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs"), *id.* at 229 ("[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"); *Vitek v. Jones*, 445 U.S. 480, 487-94 (1980) (involuntary transfer of prisoner to mental hospital implicates a liberty interest protected by the Due Process Clause); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *Youngberg v. Romeo*, 457 U.S. 307, 315-16, 319 (1982) (involuntarily committed mental patients have right to "safe conditions" and "freedom from bodily restraint"); *Parham v. J.R.* 442 U.S. 584, 600 (1979) (setting standards for voluntary admission of minor children to mental hospitals by parents or guardians); *Winston v. Lee*, 470 U.S. 753, 758-66 (1985) (State could not compel defendant to undergo surgery under general anesthetic to remove a bullet lodged in his chest which could constitute evidence of a crime) (Fourth Amendment); *Schmerber v. California*, 384 U.S. 757, 766-72 (1966) (deciding permissibility of withdrawing blood sample to determine intoxication of driver); *Rochin v. California*, 342 U.S. 165 (1952) (Due Process Clause forbade stomach pumping to obtain proof of intoxication).

mandating) same-sex acts of sodomy could possibly contravene that interest. This Court's "cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection," *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992),[7] have little, if anything, to do with the authority of the State to prohibit certain types of sexual conduct, especially when the conduct itself may entail substantial health risks to those who engage in it.

Privacy of the Home

Finally, petitioners claim that the prohibition of same-sex acts of sodomy improperly interferes with the privacy of the home. Pet. Br. at 14-15. This line of cases does not support petitioners' argument, either. Petitioners disclaim any challenge to the circumstances under which the police entered their home and observed their homosexual conduct. *Id.* at 14-15. Hence, their reliance on the Court's Fourth Amendment decisions is misplaced. The Fourth Amendment places no limits on *what* conduct may be made criminal, only on the *means* by which evidence of that conduct may be obtained.[8]

The sanctity of the home is an exceptionally important constitutional and societal value, but it is not a shield for

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[7] In *Casey*, the Court observed that restrictions on abortion may affect "the very bodily integrity of the pregnant woman," *id* at 896, which, of course, cannot be said of restrictions on sodomy.

[8] Contrary to the Brief of *Amici Curiae* Constitutional Law Professors (at 16), the Court has understood its decision in *Stanley v. Georgia*, 394, U.S. 557 (1969), holding that possession of obscene materials in the privacy of the home could not be made a criminal offense, to be "'firmly grounded in the First Amendment,'" not the Fourth. *See Osborne v. Ohio*, 495 U.S. 103, 103 n.3 (1990) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986)).

criminal conduct:

> Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. *Stanley* [*v. Georgia*, 394 U.S. 557 (1969)] itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods.

Bowers, 478 U.S. at 195, citing *Stanley v. Georgia*, 394 U.S. at 568 n.11. *See also Osborne v. Ohio*, 495 U.S. 103, 108-11 (1990) (distinguishing *Stanley* and upholding the authority of the State to proscribe the possession and viewing of child pornography even in the privacy of the home).

Petitioners do not claim that "ordinary criminal conduct may find refuge in the home," only that privacy interests are implicated here because the home "is the place where most intimate associations are centered." Pet. Br. at 15 n.9 (citation and internal quotation marks omitted). But, even if, as in *Bowers*, petitioners' "submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." *Id.* at 195-96. Neither petitioners nor their *amici* have provided the Court with any principled basis on which it could distinguish sodomy from adultery, incest (between adult relatives), group sex or even prostitution, all of which may be committed in the privacy of the home. Indeed, petitioners' formulation of the interest they seek the Court to recognize does not admit of such distinctions. *See* Pet. Br. at 19 ("adults have a fundamental interest in consensual sexual

intimacy"). Nor do the formulations of the asserted interest (or right) by their *amici*.[9] If the liberty interest *is* fundamental, then *any* restrictions on its exercise would have to meet the strict scrutiny standard of review, *Reno v. Flores*, 507 U.S. 292, 302 (1993) (Fourteenth Amendment's guarantee of due process "forbids the government to infringe . . . 'fundamental' liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest") (emphasis in original), as petitioners and their *amici* freely admit. Pet. Br. at 26 ("Section 21.06 furthers no compelling interest").[10] That, however, would work a major (and unwarranted) change in the Court's jurisprudence.

Nothing in the liberty language of the Due Process Clause of the Fourteenth Amendment confers a right to engage in sexual relations outside of marriage, and petitioners have identified no cases of this Court holding otherwise.

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[9] *See, e.g.*, Brief *Amici Curiae* of the ACLU the ACLU of Texas at 2 (the Due Process Clause "protects the liberty of consenting adults to decide what sexual intimacies they will share in private"); Amicus Brief of Human Rights Campaign, *et al.*, at 2 ("the right to be free from governmental intrusion into, and criminalization of, private sexual relations between consenting adults"); Brief of *Amici Curiae* Constitutional Law Professors at 11 ("the right to make decisions about the nature of their private, consensual sexual relationships with other adults free from state interference"); Brief *Amicus Curiae* of the ABA at 16 ("an adult's right to engage in private, consensual intimate conduct is a component of liberty protected by the Due Process Clause").

[10] *See also* Brief *Amici Curiae* of the ACLU and the ACLU of Texas at 4 ("the government must provide a compelling justification before it may dictate the content of personal decisions regarding sexual intimacy"); Brief *Amicus Curiae* of the ABA at 14-15 ("intimate sexual conduct between two consenting adults that occurs in the privacy of the home should not be the basis of a criminal conviction absent some truly compelling government interest").

B. The Prohibition Of Same-Sex Acts Of Sodomy Is Rationally Related To One Or More Legitimate State Interests.

Where, as here, the challenged statute does not implicate a fundamental right, there is no need "for complex balancing of competing interests" and it may be upheld if it possesses "a reasonable relationship to a legitimate state interest." *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).[11] *Amicus* anticipates that respondent and other *amici* will discuss in more detail the various legitimate state interests the Texas sodomy law promotes. Nevertheless, *amicus* must respond to the contention of petitioners that legislation may not be based on notions of morality. *Bowers*, of course, held that the Georgia sodomy statute could be based on the belief that such conduct is immoral: "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U.S. at 196. This was not an isolated or even an unusual holding. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (the police powers of the State extend to "public health, safety and morals") (plurality opinion); *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("[p]ublic safety, public health, morality, peace and quiet, law and order–these are some of the most conspicuous examples of the traditional application of the police power"). Neither petitioners nor their supporting *amici* cite a single decision of the Court holding that notions of morality--public or private--may not serve as a basis for legislation.

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[11] For that reason, the Court need not engage in the "balancing of competing interests" petitioners attempt in their brief. *See* Pet. Br. at 25-29.

In his dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan observed that "society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well." *Id.* at 545-46. To attempt to draw a line "between public behavior and that which is purely consensual or solitary," as petitioners advocate, allowing state regulation of the former but not the latter, "would be to withdraw from community concern a range of subjects with which every society in civilized time has found it necessary to deal." *Id.* at 546. No such line-drawing is required by this Court's decisions or the Constitution.

C. *Bowers v. Hardwick*, 478 U.S. 186 (1986), Should Not Be Overruled.

Petitioners and their *amici* mount a vigorous attack on *Bowers v. Hardwick*, 478 U.S. 186 (1986), demanding that it be overruled. Pet. Br. at 29-32; Brief *Amici Curiae* of the ACLU and the ACLU of Texas, Brief *Amicus Curiae* of the ABA at 14-24. Even apart from considerations of *stare decisis*, however, that demand should be rejected.

First, the actual *holding* in *Bowers*, that there is no fundamental liberty interest (or right) to engage in same-sex acts of sodomy, is fully consistent with this Court's precedents refusing to recognize (in a variety of contexts) a right of adults to engage in sexual conduct outside of marriage, and acknowledging the State's authority to proscribe such conduct. *See* Argument II(A), *supra*. Second, the analysis and methodology employed in *Bowers* for evaluating due process liberty claims are indistinguishable from those used by the Court in assessing other asserted liberty interests. The inter-

est must be described with precision.[12] And the interest, so described, may be regarded as "fundamental" *only* if it is firmly rooted in "the Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 710. *See also, id.* at 720-21; *Collins*, 503 U.S. at 125-27 & n.10; *Cruzan*, 497 U.S. at 278-79; *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). But, as demonstrated in *Bowers*, no interest in engaging in same-sex acts of sodomy can be derived from our

[12] *Washington v. Glucksberg*, 521 U.S. 702, 720-23 (1997) (characterizing asserted liberty interest as "a right to commit suicide which itself includes a right to assistance in doing so," not whether there is "a liberty interest in determining the time and manner of one's death," "a right to die," "a liberty to choose how to die," "[a] right to choose a humane, dignified death," or "[a] liberty to shape death") (citations and internal quotation marks omitted); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (describing alleged right as "the . . . right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than that of a government-operated or government-selected child-care institution," not whether there is a right to "freedom from physical restraint," "a right to come and go at will," or "the right of a child to be released from all other custody into the custody of its parents, legal guardians, or even close relatives"); *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125-26 (1992) (describing asserted interest as a governmental employer's duty "to provide its employees with a safe working environment"); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278-79 (1990) (declining to decide whether there is a "right to die," but assuming that the Constitution granted competent persons "a constitutionally protected right to refuse lifesaving hydration and nutrition"); *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (focusing on "historical traditions specifically relating to the rights of an adulterous natural father," rather than on whether "parenthood," "family relationships," "personal relationships," or "emotional attachments in general," are interests that have historically been recognized and protected) (plurality opinion) (citations and internal quotation marks omitted).

history and traditions. 478 U.S. at 192-94.[13]

Petitioners argue that contemporary legal (and social) acceptance of conduct traditionally and uniformly proscribed by the States undermines any basis for holding that such conduct may not be protected as a "fundamental liberty interest." Pet. at 20. "[T]he Court has always deemed it essential that the relevant legal tradition have continuing vitality today." *Id.* Petitioners reason that because barely one-fourth of the States retain criminal prohibitions of sodomy, the legal underpinnings of *Bowers* have been removed and the holding in *Bowers* collapses under the weight of current legal and social views of sodomy. Neither of the precedents petitioners cite supports this argument, however.

[13] Petitioners and their *amici* make much of the fact that the longstanding prohibition of sodomy identified in *Bowers* reached both homosexual *and* heterosexual acts. Pet. Br. at 21-22 & nn. 14-15; Brief of Professors of History as *Amici Curiae* at 3-10; Brief of *Amici Curiae* the ACLU and the ACLU of Texas at 12, 16-17 & nn. 13-14, 22-27; Brief *Amicus Curiae* of the ABA at 17-19 & n. 12. But they utterly fail to explain the relevance of this evidence to the issue at hand. Although the historical prohibition of sodomy may have included both homosexual and heterosexual acts, the fact remains that there was an unbroken and uniform condemnation of *homosexual* acts of sodomy in common and statutory law from colonial times until 1961, and that even as late as 1986, when *Bowers* was decided, such acts were criminal in almost one-half of the States. Significantly, *all* of the historical evidence marshaled by petitioners and their *amici* demonstrate that the conduct of which petitioners were convicted in this case--anal intercourse between two men--was *always* included in *any* definition of sodomy. Equally irrelevant is evidence that "as early as the post-Revolutionary period, states have very rarely applied laws banning sodomy . . . to consenting adults in private." Brief *Amici Curiae* of the ACLU and the ACLU of Texas at 13. Lack of enforcement could be attributed to any number of factors, including the difficulty of obtaining admissible evidence of the crime and finding witnesses willing to testify, as well as the allocation of scarce investigative and prosecutorial resources.

In *Washington v. Glucksberg*, the Court noted that the States' assisted-suicide bans had been reexamined in recent years and, with one exception, reaffirmed. 521 U.S. at 716. In concluding that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause," the Court said that "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it." *Id.* at 728. Nevertheless, the Court neither stated nor implied that *only* a near uniform, contemporary rejection of the asserted liberty interest is an indispensable prerequisite to its denial. Moreover, *amicus* emphasizes that there were *two* questions to be answered in *Glucksberg*: Whether the liberty language of the Due Process Clause included "a right to commit suicide," and, if so, whether that "interest include[d] a right to assistance in doing so." *Id.* at 723. *Glucksberg* clearly and unequivocally rejected *both* a right to commit suicide *and* a right to assistance in committing suicide, and this despite evidence that suicide itself has not been a criminal offense in the United States since colonial times. *Id.* at 712-14.

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), Justice Scalia, joined by the Chief Justice, Justice O'Connor and Justice Kennedy, noted that the petitioner had failed to show any historical support for "the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man." *Id.* at 125. Because it was petitioner's burden "to establish that such a power . . . is so deeply embedded within our traditions as to be a fundamental right," Justice Scalia commented that "the lack of evidence alone might defeat his case." *Id.* Nevertheless, he added that "the evidence shows that even in modern times . . . the ability of a person in [petitioner's] position to claim paternity has not been generally acknowledged." *Id.*

As *Michael H.* suggests and *Glucksberg* confirms, a longstanding tradition of rejecting an asserted "right" may suffice to deny its recognition as a protected liberty interest, even if the conduct has been largely (as in sodomy) or entirely (as in suicide) decriminalized. Thus, the fact that only thirteen States still prohibit sodomy, as opposed to the twenty-four States at the time *Bowers* was decided, does not change the constitutional calculus.[14] There is no fundamental liberty interest in engaging in acts of same-sex sodomy.[15]

States may be deterred from removing criminal penalties for certain types of conduct (*e.g.*, possession of marijuana) if they believe that decriminalization may turn out to be a one-way street, *i.e.*, if enough other States remove penalties for the same conduct, this Court may discover a new liberty interest in engaging in that conduct. States may decriminalize certain conduct without intending thereby either to create a constitutional right to engage in the formerly prohibited conduct, or to forever bar themselves from reinstating penalties if the experiment with decriminalization fails.

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[14] It should be noted that "the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens." *Romer v. Evans*, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting).

[15] Petitioners' attempt to import Eighth Amendment principles of interpretation into due process jurisprudence, *see* Pet. Br. at 24, citing *Atkins v. Virginia*, 536 U.S. 304 (2002), should be resisted. Resort to "evolving standards of decency" may be appropriate in interpreting the Eighth Amendment, *Trop v. Dulles*, 356 U.S. 86, 101 (1958), but that is because the text of the Amendment itself fairly contemplates reliance on such standards. The same cannot be said of the Due Process Clause. *See Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992).

Finally, petitioners state that "[d]enying the existence of a liberty interest in private consensual adult sexual activity would give constitutional legitimacy to the grossest forms of intrusion into the homes of individuals and couples." Pet. Br. at 15. *See also* Brief of *Amici Curiae* Constitutional Law Professors at 24-27. Petitioners' suggestion that denial of their due process claim in this case would usher in a reign of "sexual fascism" cannot be reconciled with their admission that police and prosecutors have *never* pursued a policy of investigating and prosecuting strictly private, noncommercial sexual conduct between consenting adults. *Id.* at 21, 45. That such a policy was never pursued in the past, even after *Bowers* was decided more than sixteen years ago, should allay any concern that it would ever be pursued in the future.

III. THE POLICY CHOICE OF THE STATE OF TEXAS TO PROHIBIT SAME-SEX, BUT NOT OPPOSITE-SEX, ACTS OF SODOMY DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners also attack § 21.06 on equal protection grounds. Pet. Br. at 32-50. Petitioners and their *amici* assert that the statute classifies persons on the basis of their sexual orientation, and that legislative classifications based on sexual orientation discriminate against homosexuals in violation of the Equal Protection Clause. Neither their premise nor their conclusion withstands scrutiny.

A. Section 21.06 Does Not Classify Persons.

Section 21.06 classifies *conduct*, not *persons*, much less persons of a particular sexual orientation. The statute applies to same-sex acts of sodomy regardless of one's sexual

orientation--homosexual, bisexual or heterosexual. No conviction under § 21.06 requires proof of the defendant's sexual orientation, and evidence of a defendant's heterosexual orientation would not constitute a defense. Thus, it cannot be said that the law "creates classes of persons." Pet. Br. at 9. *See also* Brief of the National Lesbian and Gay Law Ass'n, *et al.*, as *Amici Curiae*, at 5 (referring to "legislative actions that classify persons"); Amicus Brief of Human Rights Campaign, *et al.*, at 2 ((law "punish[es] and brand[s] as criminals a class of citizens defined by their emotional and physical attraction to members of the same sex as themselves"). For that reason, the myriad of cases petitioners and their *amici* cite regarding limitations on the authority of the States under the Equal Protection Clause to classify *persons* (or groups of persons) are inapplicable. Statutes that do not "draw any distinctions between persons," but "apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause." *Vacco v. Quill*, 521 U.S. 793, 800 (1997), quoting *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979).[16]

Even assuming, however, that in prohibiting acts of same-sex sodomy, § 21.06 may be said to classify on the basis of sexual orientation (because only same-sex acts are prohibited), petitioners and their *amici* have not shown that such classification is unconstitutional. As a threshold matter, nothing in the record indicates the sexual orientation of petitioners themselves. If the classification the State is purporting to define is persons of a homosexual orientation, we do not know, on this record, whether petitioners even belong to the class. That alone is sufficient to reject their equal protection

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[16] That § 21.06 may affect primarily homosexuals is of no more constitutional significance than the fact that the veterans' preference upheld in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), primarily benefitted men.

challenge. Putting that standing question to one side, petitioners have not shown that classifications proscribing conduct on the basis of sexual orientation are unconstitutional.

B. Classifications Prohibiting Conduct On The Basis Of Sexual Orientation Are Not Subject To Heightened Scrutiny.

Petitioners assert that "[h]eightened scrutiny is appropriate for laws like Section 21.06 that use a sexual-orientation-based classification." Pet. Br. at 32 n.24. Nevertheless, they do not develop an argument that the Court should *adopt* such a standard of review and none of their *amici* ask the Court to do so, either. Petitioners' failure to ask the Court to adopt a heightened standard of review is not surprising because there is no law to support such a request.

This Court has never held that sexual orientation is a suspect (or even a quasi-suspect) basis for classification and has strongly implied that it is not. *See Romer v. Evans*, 517 U.S. 620, 628-29 (1996) (noting that in extending the protection of anti-discrimination statutes and ordinances to include sexual orientation, "Colorado's state and local governments have not limited anti-discrimination laws to groups that so far have been given the protection of heightened equal protection scrutiny under our cases"). With the exception of one panel decision of the Ninth Circuit Court of Appeals that was later withdrawn, *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *withdrawn*, 875 F.2d 699, 711 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990), no federal court of appeals has ever applied heightened scrutiny when considering equal protection claims in the context of sexual orientation. Nine of the thirteen federal courts of appeals have held that homosexuals do not constitute a suspect or a quasi-suspect class entitled to greater than rational basis scrutiny for equal

protection purposes,[17] and a tenth court of appeals has strongly intimated the same. *See Shahar v. Bowers*, 114 F.3d 1097, 1099 n.2 (11th Cir. 1997) (*en banc*) ("Given the culture and traditions of the Nation, considerable doubt exists that plaintiff [a woman] has a constitutionally protected federal right to be 'married' to another woman"), *cert. denied*, 522 U.S. 1049 (1998).

"Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes" because it is "primarily behavioral in nature." *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). *See also High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes"). Because it is "primarily behavioral in nature," homosexuality lacks common elements with those classifications which are based on immuta-

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[17] *See Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996) (*en banc*), *cert. denied*, 519 U.S. 948 (1996); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (*en banc*), *cert. denied*, 478 U.S. 1022 (1986); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 128 F.3d 289, 292-93 & nn.1-2 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 & n.8 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Richenberg v. Perry*, 97 F.3d 256, 260 & n.5 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Holmes v. California National Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999); *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997); *High Tech Gays v. Defense Industrial Services Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (*en banc*), ; *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

ble, observable or legal characteristics, such as race, sex, alienage or illegitimacy. For that reason, it should not be treated as a suspect or quasi-suspect basis for classification.[18]

C. *Romer v. Evans*, 517 U.S. 620 (1996), Does Not Control The Disposition Of This Case.

In asking the Court to strike down the Texas sodomy statute on equal protection grounds, petitioners and their *amici* rely heavily upon *Romer v. Evans*, 517 U.S. 620 (1996), where the Court declared unconstitutional Amendment 2 to the Colorado Constitution.[19] Petitioners' reliance on *Romer* is misplaced and their effort to "shoehorn" the facts of this case into the framework of *Romer* fails.

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[18] Petitioners' comment in passing that § 21.06 "employs a gender-based classification," Pet. Br. at 32 n.34, and, therefore, should be subject to intermediate scrutiny, overlooks the fact that the statute affects men and women equally. Neither men nor women may engage in acts of sodomy with other members of the same sex. *See State v. Walsh*, 713 S.W.2d 508 (Mo. 1986). Section 21.06 no more discriminates on the basis of sex than do statutes barring members of the same sex from marrying each other. *See Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (upholding prohibition of same-sex marriage).

[19] "No protected status based on homosexual, lesbian or bisexual orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing." COLO. CONST. Art. II, § 30b (West 2001).

In the very first paragraph of the opinion in *Romer*, the Court said that the Equal Protection Clause endorses the principle that the law must be neutral "where the rights of persons are at stake." 517 U.S. at 623. Unlike *Romer*, however, where a variety of legal rights were affected by Amendment 2, including the ability to "change the law,"[20] there is no underlying right--constitutional or otherwise--affected by the Texas sodomy statute. *See* Argument II, *supra*; *Bowers v. Hardwick*, 478 U.S. 186 (1986). Moreover, as noted above, *see* Argument III(A), *supra*, § 21.06 classifies *conduct*, not *persons*. The state constitutional amendment struck down in *Romer* purported to reach beyond "homosexual, lesbian or bisexual . . . conduct, practices or relationships," to include "orientation," as well. Thus, in a constitutionally relevant sense, Amendment 2 discriminated on "the status of being a homosexual [lesbian or bisexual]," *Fuller v. Rich*, 925 F.Supp. 459, 462 (N.D. Tex. 1995), *aff'd in part without published opinion*, 91 F.3d 138 (5th Cir. 1996). Indeed, in the penultimate paragraph of its opinion in *Romer*, the Court described Amendment 2 as a "*status-based enactment* divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 517 U.S. at 635 (emphasis supplied).

"Amendment 2, confounds [the] normal process of judicial review" under the Equal Protection Clause:

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[20] *Id.* at 631 (noting that under Amendment 2, homosexuals "can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps . . . by trying to pass helpful laws of general applicability," irrespective of "how local or discrete the harm, no matter how public and widespread the injury").

> It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence

Id. at 633. Unlike Amendment 2, § 21.06 of the Texas Penal Code does not "identif[y] persons by a single trait," or "den[y] them protection across the board." It in no way purports to "disqualif[y] . . . a class of persons from the right to seek specific protection from the law."

> Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries, caused by discrimination, and it forbids reinstatement of those laws and policies.

Id. at 267. None of this can be said of § 21.06.[21] *Romer* does not dictate the outcome of this case.

D The Prohibition Of Same-Sex Acts Of Sodomy Is Rationally Related To One Or More Legitimate State Interests.

Where "a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate

[21] This case does not present the question as to whether statutes that discriminate *solely* upon one's sexual orientation, as opposed to one's conduct (however motivated), are constitutional.

end." *Romer v. Evans*, 517 U.S. at 632, citing *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Moreover, the legislature need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). Instead, the classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Section 21.06 does not burden a fundamental right nor does it target a suspect class. The statute is rationally related to one or more legitimate state interests, including the State's belief that sexual acts between members of the same sex are immoral and should be discouraged. Such a belief does not betray Texas as benighted or bigoted any more than opposition to abortion indicates an animus against women. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269-71 (1993). It is a belief that is consistent with a long tradition in English and American law, as this Court acknowledged in *Bowers*. Even without regard to other possible state interests (*e.g.*, promoting public health), that is sufficient to sustain its constitutionality under the Equal Protection Clause.

Petitioners ask the Court to hold that there is no rational basis for distinguishing same-sex acts of sodomy, which § 21.06 prohibits, from opposite-sex acts of sodomy, which it allows. But, "the two sexes are not fungible." *United States v. Virginia*, 518 U.S. 515, 533 (1996), quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946). Same-sex acts cannot be equated with opposite-sex acts. If it is "irrational" for the States to forbid same-sex, but not opposite-sex, sodomy, then it may be asked whether it is not also irrational for the States to allow opposite-sex couples, but not same-sex couples, to marry. Petitioners' answer is not in doubt.

In the final paragraph of their brief, petitioners, referring to *Boddie v. Connecticut*, 401 U.S. 371 (1971), assert that "the majority may not decide that the availability of divorce . . . is critical for the majority itself but then deny [that] benefit[] to a few, ..." Pet. Br. at 50. Substitute "marriage" for "divorce," and it becomes immediately apparent that petitioners intend to use a favorable holding in this case as a judicial battering ram to break down the statutory barriers to same-sex marriage. Petitioners have not shown that they are entitled to such a holding. Accordingly, the judgment of the Texas Court of Appeals should be affirmed.

CONCLUSION

For foregoing reasons, *amicus curiae*, United Families International, respectfully requests that this Honorable Court affirm the judgment of the Texas Court of Appeals.

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